Journal of Natural Resources & Environmental Law

Volume 5
Issue 3 *Journal of Mineral Law & Policy, volume 5, issue 3*

Article 12

January 1990

Implementing a VER Definition: Practical Concerns About the Bundle of Sticks, the Corners of the Deed, and Shifting Burdens

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Implementing a VER Definition: Practical Concerns About the Bundle of Sticks, the Corners of the Deed, and Shifting Burdens

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This paper is premised on the notion that it will be extremely difficult, if not impossible, for the Office of Surface Mining Reclamation and Enforcement (OSM)[1] to promulgate a regulation defining the term "valid existing rights"[2] which entirely satisfies all the constitutional and policy concerns identified during the thirteen-year history of definitional attempts.[3] Accordingly, this paper will discuss the practical and administrative concerns attendant upon the people in the various state regulatory authorities who will have to implement whatever it is that Congress meant when it said "subject to valid existing rights . . ."[4]

The Surface Mining Control and Reclamation Act of 1977 ("SMCRA") does not define the term "valid existing rights" (VER). However, 30 C.F.R. Section 761.5 (1979) did define the term, in part, as:

> (1)Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to

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[1] OSM, a unit of the U.S. Department of the Interior, is the administrative agency charged with administering the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

[2] SMCRA § 522(e), 30 U.S.C. § 1272 (e) (1988).

[3] *See, e.g., In re*: Permanent Surface Mining Regulation Litig. I, 14 Env't Rep. Cas. (BNA) 1083 (D. D.C., 1980); Notice of Proposed Action, 47 Fed. Reg. 25,278 (1982) Notice of Final Action, 48 Fed. Reg. 41,312 (1983).

[4] SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988).

produce coal by a surface coal mining operation; and
(2)The person proposing to conduct surface coal mining operations on such lands either
(i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands, or
(ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977.

The 1979 definition of VER was challenged by various plaintiffs on four grounds in *In re: Permanent Surface Mining Regulation Litigation I*:[5] (1) Whether Congress intended to preserve private property rights recognized under State law; (2) whether the Secretary of the Interior's construction of valid existing rights is an unconstitutional taking of property proscribed by the Fifth and Fourteenth Amendments; (3) whether the "all permits" test is arbitrary and capricious; and (4) whether the "needed for and adjacent" test unduly expands the scope of the VER exception. U.S. District Judge Flannery held on each of the four challenges, respectively, that: (1) "existing State law may be applied to interpret whether the document relied upon established valid existing rights.";[6] (2) The takings challenge was premature because no party could complain of an unconstitutional application of the definition;[7] (3) An operator who applies for all permits, but fails to receive one through government delay, "engenders the same investments and expectations as an operator who timely receives all permits"[8] and accordingly, a "good faith attempt to obtain all permits before the August 3, 1977 cutoff date" would suffice to meet the "all permits" test;[9] and (4) that the "need and adjacent" test is a rational method of allowing mining "when denial would gravely diminish the value of the entire mining operation, thereby constituting a taking under Supreme Court declarations."[10]

In the Preamble to the 1979 Final Rules,[11] OSM cited the legislative history of SMCRA as support for the premise that

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[5] 14 Env't Rep. Cas. 1083 (D. D.C., 1980).
[6] *Id.* at 1090, as conceded by the Secretary of the Interior.
[7] *Id.* at 1091.
[8] *Id.*
[9] *Id.*
[10] 14 Env't Rep. Cas. at 1092.
[11] 44 Fed. Reg. 14,902-15,903 (1979).

Congress wanted to avoid any takings in the implementation of Section 522(e). OSM stated that it endeavored to "determine the point at which payment would be required because a taking had occurred, then to define [VER] in those terms, *i.e.*, those rights which cannot be affected without paying compensation."[12]

OSM also relied upon legislative history of VER in which Congress cited and discussed *United States v. Polino*.[13] In *Polino*, the Court examined a deed conveying coal for language granting the right to extract the mineral by surface mining methods. OSM noted that the *Polino* decision does not address whether a restriction on mining coal by surface mining methods might constitute a taking for which compensation would be owed; however, the concepts of "the nature of the right being conveyed between private parties and the method of interpreting the document which conveys that right" were incorporated into the 1979 VER definition.[14] OSM also analyzed other "takings" cases,[15] and seized upon the distinction between an owner's value in an ongoing operation which must be halted, versus the value that an owner has paid for some future operation that will be restricted. Recognizing that takings jurisprudence shows less sympathy for an owner who is denied a future opportunity to fully exploit his or her property interest although based on an expectation that the property would be available for development, OSM was able to justify its "need for and adjacent," and "all permits" tests.[16]

A point central to today's continuing debate about VER is one that OSM acknowledged in the 1979 Preamble, namely that SMCRA changed the atmosphere surrounding the extraction of coal. Congress made it clear that surface coal mining on any private or Federal land is "not an absolute right,"[17] but may occur only after approval by a regulatory authority which has determined that reclamation to the standards of SMCRA can be achieved. "Thus, at least as of enactment of the Act, landowners no longer have an unconditional right to mine. OSM therefore

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[12] *Id.* at 14,992.

[13] 131 F.Supp. 772 (N.D. W.Va. 1955).

[14] 44 Fed. Reg. at 14,992.

[15] 44 Fed. Reg. at 14,992, citing Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. City of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928).

[16] *Id.*

[17] 44 Fed. Reg. at 14,993.

believes that the definition of VER should take into account both the new regulatory framework created by the Act and the fact that the Act applies VER to both private and Federal lands."[18]

OSM decided that VER had to be determined on a case-by-case basis, because it is a site-specific concept. However, OSM rejected the option of not defining VER, and decided that the concept should be defined "in order to achieve a measure of *consistency*" in interpretation.[19]

In 1983, OSM turned the concept of "consistency in interpretation" on its head by adopting a new definition of VER intended to allow the various regulatory authorities to "conform the determination of valid existing rights to the continuing development of takings law in the courts."[20] In an attempt to "provide states with new flexibility,"[21] the 1983 final rule amended the definition of VER to reject a "bright line" definition in favor of a requirement for case-by-case examination of the constitutionality of application of the mining prohibition. OSM decided that there was "insufficient legal basis" for defining VER in terms of any class of circumstances, because the courts had been unable to prescribe set formulas for determining whether a taking had occurred.[22] This proposal left the VER determination up to the various state regulatory authorities, based upon the applicant's submission of information to the state, including names of owners of mineral rights, copies of the conveyance, leases, deeds, copies of any permits, and land ownership information.[23] The state administrators would then review the information to determine "whether the application of the prohibition in [Section] 522(e) would result in a taking under the Fifth and Fourteenth Amendments to the U.S. Constitution."[24]

The 1983 VER regulation was remanded to the Secretary by Judge Flannery in 1985 in *In re: Permanent Surface Mining Regulation Litigation* (II).[25] The court held that the broad tak-

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[18] *Id.*
[19] *Id.* (emphasis added).
[20] 48 Fed. Reg. 41,312 (1983).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 22 Env't Rep. Cas. 1557 (D. D.C., 1985).

ings standard represented such a significant departure from the three options described in the proposed rule in 1982,[26] that a new notice and comment period was necessary to satisfy the requirements of the Administrative Procedure Act.[27] In response to the court's order, on November 20, 1986 OSM suspended the definition. OSM thereafter took the position that the 1986 suspension had the effect of restoring the VER test in use before the 1983 definition was promulgated.[28] This has indeed been the effect of the suspension in most of the states with approved programs.[29]

In addition to its prohibition of issuance or renewal of any permit for surface coal mining operations in the congressionally-mandated areas,[30] the Maryland Annotated Code, Natural Resources Article, Section 7-505(b)(2)(ii), prohibits surface coal mining operations "[w]ithin the Yougiogheny River scenic corridor, notwithstanding any other provision of law." Part of the Yougiogheny River has been designated as a wild river under the State's Scenic and Wild Rivers program.[31] Since 1975, Maryland law has expressly prohibited "mining of any minerals by the strip or open pit method" in the Scenic Corridor of the Wild River segment of the Youghiogheny.[32] There is an exception for areas within the scenic corridor which have previously been mined and are not reclaimed.[33]

In 1988, OSM again proposed to change the definition of VER.[34] For the standards for VER in 30 C.F.R. Section 761.5(a)(2), OSM proposed two options: First, under the "own-

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[26] 47 Fed. Reg. 25,278 (1982).

[27] 22 Env't Rep. Cas. at 1565.

[28] *See* 51 Fed. Reg. 41,961 (1986) (suspending regulation) and 53 Fed. Reg. 52,374 (1988) (recognizing restoration of the pre-1983 VER definition).

[29] The following states had enacted regulations which mirrored or closely followed the 1979-80 modified all permits test as of March 1, 1990: Alabama, Arkansas, Colorado, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah and West Virginia. States with other versions of a VER definition as of March, 1990 include: Illinois, with a "takings" test approved January 4, 1989, Virginia, with a "takings" test effective June 16, 1988; and Wyoming, with a "takings" test effective November 24, 1986. (Data from COALEX).

[30] SMCRA §§ 522(e)(3), (4), and (5), 30 U.S.C. §§ 1272(e)(3), (4), and (5). There are no mineable coal seams in § 522(e)(1) or (2) areas in Maryland.

[31] Maryland Annotated Code, Natural Resources Article § 8-408 (1990).

[32] *Id.*

[33] *Id.*

[34] Preamble to Proposed Rules, 53 Fed. Reg. 52,374 (1988).

ership and authority option," a regulatory authority would find that VER exists if the person can demonstrate both ownership of the coal and the right, as determined by the laws of the State, to extract the coal by the method intended.[35] This option would not require applicants to demonstrate that they had applied for necessary permits by any particular date. Rather, VER would be a function of State property rights. Under the second "good faith-all permits" option, OSM proposed that VER exists if the person desiring to conduct surface coal mining operations has obtained, or has made a good faith effort to obtain, all necessary permits as of the effective date of the mining prohibition.[36]

The legislative history of SMCRA cited by OSM in the Preamble[37] relies heavily on *United States v. Polino*,[38] in which the court examined "as a matter of law, whether or not a reservation of coal and mining rights contained in a certain deed carried with it the legal right to employ mining methods known as 'strip mining.'"[39] The court examined a June 28, 1917 deed conveying 1,120 acres in West Virginia to the United States. Subsequently, the government set aside part of that acreage which eventually was incorporated into the Monongahela National Forest. The deed from the grantor to the United States reserved mineral and mining rights including "the right to mine and remove minerals from the above-described land . . . provided that the mining and removal of minerals so reserved shall be done strictly in accordance with rules provided by the Secretary of Agriculture."[40] When the grantor's successor in interest attempted to remove the reserved coal by a strip mining operation, the United States contended that strip mining was not allowed under the reservation of minerals in the 1917 deed.

The *Polino* court turned to West Virginia cases which interpreted the language of severance deeds, and the usage and custom of the minerals industry at the time of the various deeds. The court found that, in 1917, there were no coal stripping operations in the county where the lands were located, and that when the government acquired such lands, "it is obvious that

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[35] *Id.*

[36] *Id.* at 52,378.

[37] *See supra* note 36.

[38] 131 F.Supp. at 772; *See supra* notes 15-16 and accompanying text.

[39] *Id.*

[40] *Id.* at 773.

both parties to that deed knew the purposes for which the United States was acquiring the land and the uses for which it was intended to be put."[41] Because the court determined the intentions of the parties to the 1917 deed, it was able to come up with the rationale that the government acquired the lands for forestry purposes, that this purpose of acquisition was known to both parties, and accordingly that the successor in interest did not acquire the right under its lease to remove the coal by strip mining.

The Preamble[42] cited *Polino*[43] as support for the notion that the right to conduct a particular mining operation must be determined in accordance with the case law from the state where the mining is contemplated. Under the ownership and authority option proposed by OSM, state regulatory authorities would of necessity be making property rights determinations. For example, the regulatory authority would have to determine whether the relevant conveyances (deeds, leases, rights of entry) have given the applicant all of the necessary rights to strip mine the coal, or whether the applicant has obtained only the right to extract the coal by underground mining. The ownership and authority option thus puts the burden squarely on the shoulders of the state regulatory authorities, and requires them to adjudicate property rights as between surface and mineral owners. Even OSM acknowledges that the right to mine via certain methods "is an issue of property rights, and would be evaluated through consideration of the provisions of state property law as they applied to a particular situation."[44] In focusing on the practical aspects of implementing a VER definition, OSM needs to remember that a state administrator may not be the best person to decide issues requiring detailed knowledge of state court decisions and state constitutions.

OSM's expressed intention in proposing the ownership and authority test was to accommodate Congress' concern about takings of property without compensation.[45] The determination whether a particular action effects a taking in contravention of the federal or state constitution is an extraordinarily complex

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[41] *Id.* at 775.
[42] *See supra* note 36.
[43] 131 F.Supp. at 772.
[44] 53 Fed. Reg. 52,374 (1988).
[45] *Id.* at 52,377.

and case-specific undertaking for each court faced with the question. It is reasonable to assume that, if Option 1 or something like it is selected, each time a VER application is presented to a state regulatory authority (RA), the RA would have to turn to counsel for advice on the complex property determinations required. Under this scenario, the agency counsel or Attorney General's Office in each state would be called upon to make constitutional pronouncements about the effect of the application of an agency's regulation.

By tying the ownership and authority option to the "takings" option, OSM will force the state RA to make essentially the same determinations under the ownership and authority test as under the takings test. This approach is overly burdensome for state administrative personnel. Moreover, applicable state law may prevent some RAs from determining property rights as between two private parties. Even if RAs are not forbidden outright by constitution or law from making private property allocations between two private parties, sound public policy dictates that states should not be making these kinds of determinations. It's simply not the state's business. Rather, the courts should decide constitutional issues.

State regulatory authorities would, I submit, find it impossible to apply with any scintilla of consistency the Option 1 test. They would examine previous court decisions in an attempt to discern the particular state's "test" for what constitutes the right to mine, and attempt to divine what was the "usage or custom at the time and place" where the deed or conveyance was executed. The latter endeavor requires a large measure of historical hindsight; were bulldozers ripping up the surface of the earth when the contract or deed was executed? Were draglines prowling the pits? After determining the usage or custom at the time and place, then the RA must also look to see whether the rights claimed by the VER applicant were "contemplated by the parties." How many "sticks" did the VER applicant acquire in the "bundle" of property rights conveyed to it in the relevant deeds or leases?

Case law illustrates the complexity of decisions which implicate state property rights.[46] In *C&T Evangelinos v. Division of Reclamation*,[47] the Ohio Division of Reclamation issued a deep

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[46] *See, e.g., Polino, supra* notes 16 and 40 and accompanying text.

[47] Slip Op. 1989 WL 109497 (Ohio App. 1989).

mining permit over the objection of the surface owners. The case turned upon the interpretation of an exception in the deed by which the surface owners obtained title to their property, and whether this exception constituted a knowing waiver of the restriction against mining within 300 feet of an occupied dwelling. The coal company claimed that it did not need a written waiver, because it had VER. The surface owners argued that their predecessors in title could not have waived the 300 foot restriction, because the deed that severed the mineral rights from the surface was executed in 1965, substantially before the 300 foot restriction became effective. The Ohio Court of Appeals rejected the surface owners' argument by looking at the 1965 deed and finding that the deed was sufficient to put the surface owners' predecessors in title on notice that they were waiving certain rights, including the right to protect their residence in the event that the mineral owner decided to extract the coal. The Court found that "[t]he fact that mining regulations enacted in 1977 provided specific methods by which this waiver could occur does not change this basic fact. The [applicant's predecessors in title] were not given the right to protect their residence by the 1977 regulation."[48]

In *Cogar v. Sommerville*,[49] the court had to decide whether the surface owners' right to prevent mining within 300 feet of their occupied dwelling had been waived by two broad form deeds' waivers of surface damages and subjacent support. The court examined the 1907 and 1914 deeds to determine whether the broad form waivers would suffice under the West Virginia counterpart to SMCRA Section 522(e)(5).[50] After examining the statutory history of SMCRA, the numerous court challenges to the federal regulations, and the provisions of the federal regulations at 30 C.F.R. Section 761.12(e) (1988), the court found that under the federal regulations an acceptable waiver is one which "is knowingly made by the owner and which specifies the distance from the occupied dwelling where mining operations may take place."[51] While the old severance deeds did waive surface damages, they did not expressly authorize mining within 300 feet of an occupied dwelling. Thus, the court concluded that

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[48] *Id.* at 7.

[49] 379 S.E.2d 764 (W.Va. 1989).

[50] W.Va. Code, 22A-3-33(d)(4) (1985).

[51] *Cogar*, 379 S.E.2d at 769.

allowing those deeds to constitute a waiver of the prohibition "would be contrary to one of the purposes Congress had in enacting SMCRA - the protection of property owners."[52] The court also turned to West Virginia case and common law for the principle that waivers of this sort are strictly construed, and that waivers of statutory rights are not created by implication.

Thus, state RAs would have to be versed not only in state and federal constitutional case law, but also in state common and case law on principles of construction of deeds.

Under the second option proposed for defining VER,[53] OSM proposed that VER exists if the person desiring to conduct surface coal mining operations has obtained, or has made a good faith effort to obtain, all necessary permits as of the effective date of the mining prohibition. This definition of VER is similar to the one initially promulgated in 1979, as modified by Judge Flannery's February 1980 opinion,[54] and it takes into account the concept of "continually created VER."[55]

While no one contends that Option 2 is a perfect test, it has the advantage of familiarity, in that is has been around for 11 years, and state RAs should be familiar with the analysis required under it. As a "bright line" test, it is conducive to easy administration, and on the facts presented, state RAs can make relatively quick decisions with minimal delay for sophisticated interpretations. In addition, under a modified all permits test, the applicant for VER has the burden of assembling a record which, on its face, allows the RA to make a decision, rather than placing the burden of a lengthy and complex legal and factual investigation on the state RA.

Cogar v. Faerber[56] is an example of a court's analysis of a VER claim under the good faith-all permits test. The coal company claimed that the coal for which it sought VER was immediately adjacent to an ongoing mining operation in existence on August 3, 1977, and that the coal was needed to make the operation economically viable. Finding that courts should construe exceptions to the state's surface mining statute narrowly, the West Virginia Supreme Court of Appeals stated that:

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[52] *Id.*

[53] 53 Fed. Reg. 52,374, 52,378 (1988).

[54] *See supra* note 7.

[55] 53 Fed. Reg. at 52,376.

[56] 371 S.E.2d 321 (W.Va. 1988).

> 'valid existing rights' must involve more that a mere expectation of conducting coal mining. Simply obtaining a lease of mineral rights to an area does not confer valid existing rights upon an operator within the meaning of [SMCRA] . . . [A]n operator must have, by August 3, 1977, completed its portion of the application process for all the necessary state and federal permits to conduct surface mining in an area contiguous to the proposed operations.[57]

The court expressly rejected the operator's contention that its entire 1,825 acre tract should be treated as a single mining operation, regardless of the fact that the mine in question was begun only in 1983, and that the proposed new surface disturbance was not immediately adjacent to any part of the mine in existence on August 3, 1977.[58] Moving to the coal company's contention that refusal of a permit modification was an unconstitutional taking of its property, the court stated that a challenge to the exercise of a state's police power must overcome a heavy burden, and that the coal company had not met its burden of presenting specific evidence about the property values in the 1,825 acre tract.[59]

I. CONCLUSION

In Maryland, VER determinations have followed the pattern described in *Cogar v. Faerber*,[60] in that the state RA has made a preliminary call on applications for VER, by looking at the documents submitted by applicants to establish that they had either in hand, or had made a good faith effort to obtain, all permits by August 3, 1977. Predictably, the number of VER applications has declined to zero in the past several years, due to the cutoff date of August 3, 1977 in the statute. While the concept of continually created VER does certainly allow for further favorable VER determinations, the "bright line" nature of the good faith-all permits test has the tremendous advantage of administrative convenience. It in no way denies a VER applicant any constitutional entitlement that the applicant may have to just compensation; it merely puts the applicant in court,

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[57] *Id.* at 324.
[58] *Id.* at 325.
[59] *Id.* at 326.
[60] 317 S.E.2d at 321.

where such claims rightfully belong, for adjudication of a claim that the regulatory authority's application of the statutory prohibition on mining has effected an unconstitutional taking of property.

From the perspective of a state regulatory authority, I can only urge that the regulators at OSM take a careful look at the practicality and consistency of administration of each of the proposed VER options.